

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

BRANDON APELA AFOA,

Plaintiff,

v.

CHINA AIRLINES LTD, et al.,

Defendants.

CASE NO. C11-0028-JCC

ORDER GRANTING IN PART AND
DENYING IN PART TLD
AMERICA'S MOTION TO DISMISS

This matter comes before the Court on Defendant TLD America's motion to dismiss Plaintiff's claims against it (Dkt. No. 41). Having thoroughly considered the parties' briefing and the relevant record, the Court finds oral argument unnecessary and hereby GRANTS IN PART AND DENIES IN PART the motion for the reasons explained herein.

I. BACKGROUND

Plaintiff worked for Evergreen Aviation Ground Logistics Enterprises, Inc., ("EAGLE"), a company that provided ground services to multiple airlines at Seattle-Tacoma International Airport ("SeaTac"). (Dkt. No. 26 at ¶ 2.9.)¹ Plaintiff alleges that he was severely injured when the brakes and steering failed on the "pushback" he was driving and it collided with a machine used to load cargo on and off airplanes ("cargo loader"). (Dkt. No. 26 at ¶¶ 8.2, 8.10–8.12.) A

¹ All facts are taken from Plaintiff's Second Amended Complaint (Dkt. No. 26), which is the operative complaint in this matter (*see* Dkt. No. 62).

1 “pushback” is a vehicle used to move airplanes around the tarmac at large airports. (Dkt. No. 26
2 at ¶ 6.7.) Plaintiff alleges that the pushback collided with the cargo loader in the area of the “S”
3 gates at SeaTac. (Dkt. No. 26 at ¶ 8.11.) Plaintiff alleges that the cargo loader “malfunctioned
4 and the upper deck section of the cargo loader collapsed upon Plaintiff . . . , crushing him against
5 the pushback he had been operating, and sandwiched him between the upper deck of the cargo
6 loader and the pushback.” (Dkt. No. 26 at ¶ 8.12.)

7 Plaintiff alleges that Defendant TLD America (“TLD”) designed, manufactured,
8 marketed, distributed, or provided product support for the cargo loader. (Dkt. No. 26 at ¶¶ 7.4–
9 7.8.) He further alleges that TLD “failed to ensure the cargo loader was crashworthy, had
10 adequate safety features, including but not limited to adequate collision protection, adequate
11 structural properties, adequate structural design, adequate warning systems, and adequate
12 protection against collapse or side impacts.” (Dkt. No. 26 at ¶ 15.14.)

13 **II. DISCUSSION**

14 **A. Pleading Standard and Leave to Amend**

15 Under Federal Rule of Civil Procedure 8(a)(2), a complaint must contain “a short and
16 plain statement of the claim showing that the pleader is entitled to relief.” A party may move to
17 dismiss a complaint that fails to state a claim upon which relief can be granted. Fed. R. Civ. P.
18 12(b)(6). To survive a motion to dismiss, a complaint must contain sufficient factual matter,
19 accepted as true, to state a claim for relief that is plausible on its face. *Ashcroft v. Iqbal*, 556 U.S.
20 662, 677–78 (2009). The court does not accept legal conclusions as true, so “[t]hreadbare recitals
21 of the elements of a cause of action” are not sufficient to survive a motion to dismiss. *Id.* A claim
22 has facial plausibility when the plaintiff pleads factual content that allows the court to draw the
23 reasonable inference that the defendant is liable for the misconduct alleged. *Id.* at 678. A claim
24 that fails to present a “cognizable legal theory” or sufficient facts to support a cognizable claim
25 will be dismissed under Rule 12(b)(6). *Johnson v. Riverside Healthcare Sys., LP*, 534 F.3d 1116,
26 1121 (9th Cir. 2008).

1 The court should “freely give” leave to amend “when justice so requires.” Fed. R. Civ. P.
2 15(a)(2). The court weighs five factors in deciding whether to grant leave to amend—“bad faith,
3 undue delay, prejudice to the opposing party, futility of the amendment, and whether the plaintiff
4 has previously amended the complaint.” *United States v. Corinthian Colls.*, 655 F.3d 984, 995
5 (9th Cir. 2011). “Dismissal without leave to amend” on the basis of futility “is appropriate only
6 when the Court is satisfied that an amendment could not cure the deficiency.” *Harris v. Cnty. of*
7 *Orange*, 682 F.3d 1126, 1135 (9th Cir. 2012).

8 **B. Plaintiff’s Washington Product Liability Act and Negligence Claims**

9 The Washington Product Liability Act (“WPLA”) preempts all common-law negligence
10 claims for product-related injuries. *Wash. State Physicians Ins. Exchange & Ass’n v. Fisons*
11 *Corp.*, 858 P.2d 1054, 1066 (Wash. 1993). TLD argues that Plaintiff’s complaint includes a free-
12 standing claim for negligence based on the alleged malfunction of the cargo loader. (*See* Dkt.
13 No. 26 at ¶ 15.14 (alleging the TLD “breached common law duties of ordinary care owed to
14 Plaintiff”).) Plaintiff argues that this is not a freestanding claim for negligence, but rather that he
15 alleges breaches of common law duties “to the extent that common law concepts are
16 incorporated into the WPLA.” (Dkt. No. 53 at 4 n.7 (citing *Ruiz-Guzman v. Amvac Chem. Corp.*,
17 7 P.3d 795 (Wash. 2000)).) Plaintiff’s allegation of breach of common law duties is permissible
18 to the extent it supports his WPLA design defect claim; it is not a freestanding claim.

19 The WPLA imposes liability on a manufacturer for a claimant’s harm that was
20 proximately caused by a product that “was not reasonably safe as designed or not reasonably safe
21 because adequate warnings or instructions were not provided.” Wash. Rev. Code § 7.72.030(1).
22 A plaintiff may establish a WPLA violation under either a failure to warn theory or a design
23 defect theory. *Soproni v. Polygon Apartment Partners*, 971 P.3d 500, 504 (Wash. 1999). Plaintiff
24 alleges both.

25 **1. Failure to Warn**

26 The Washington State Supreme Court has held that a plaintiff cannot make out a claim

1 for failure to warn where “the record established that the lack of warnings did not contribute to
2 the accident in any way.” *Soproni*, 971 P.3d at 504. In *Soproni*, the court concluded that because
3 the plaintiff had seen her infant son open the window from which he later fell, she knew of the
4 danger and no warning could have prevented the accident. *Id.* The allegations in Plaintiff’s
5 complaint similarly establish that lack of warnings about the cargo loader did not contribute to
6 his accident. Plaintiff alleges that he lost control of the pushback and it collided with the cargo
7 loader. Plaintiff’s complaint sets out no facts from which the Court can conclude that any
8 warning TLD could have provided would have prevented this collision from happening.
9 Accordingly, Plaintiff’s WPLA claims based on failure to warn are dismissed with prejudice.
10 The Court concludes that further amendment would be futile because there is no warning TLD
11 could have provided about the cargo loader that would have prevented Plaintiff’s out-of-control
12 pushback from colliding with it.

13 **2. Design Defect**

14 A plaintiff can establish liability for a design defect in one of two ways: (1) the “risk
15 utility test”; or (2) the “consumer expectations” test. *Id.* at 504–05. Under the risk utility test, the
16 plaintiff must show that

17 at the time of manufacture, the likelihood that the product would cause the
18 plaintiff’s harm or similar harms, and the seriousness of those harms, outweighed
19 the manufacturer’s burden to design a product that would have prevented those
20 harms and any adverse effect a practical, feasible alternative would have on the
product’s usefulness.

21 *Id.* at 505. Under the consumer expectations test, the plaintiff must show that the product
22 was “unsafe to an extent beyond that which would be contemplated by the ordinary
23 consumer.” *Id.*

24 Plaintiff’s complaint alleges that the design of the cargo loader was defective
25 because when the pushback collided with the cargo loader, the cargo loader’s upper deck
26 collapsed on Plaintiff, either causing or exacerbating his injuries. His complaint also

1 alleges that the cargo loader's design was defective because it was not "crashworthy,"
2 and lacked "adequate collision protection, adequate structural properties, adequate
3 structural design . . . , and adequate protection against collapse or side impacts." (Dkt. No.
4 26 at ¶ 15.14.) Although Plaintiff's factual allegations are limited, they are sufficient to
5 state a plausible claim that the design of the cargo loader was defective under the WPLA.
6 Plaintiff is not required to decide whether he will use the risk utility or consumer
7 expectations test to support his design defect claim, and provide evidence in support
8 thereof, at this early stage in the proceeding.

9 Moreover, Plaintiff has sufficiently pled proximate cause. TLD argues that
10 Plaintiff has "failed to identify any way in which TLD America's product supposedly
11 caused plaintiff's alleged injuries." (Dkt. No. 41 at 11.) To the contrary, Plaintiff has
12 alleged that TLD's cargo loader was the proximate cause of Plaintiff's injuries because it
13 collapsed on him.

14 Plaintiff's allegations regarding the nature of the design defect would certainly be
15 stronger if supported by the kinds of factual allegations that Plaintiff included in his
16 response to TLD's motion to dismiss. (Dkt. No. 53 at 9–10.) Although he is not required
17 to do so, Plaintiff is granted leave to amend his complaint to add those factual allegations
18 if he wishes to do so.

19 The Court does not accept TLD's argument that Plaintiff should not be permitted
20 to further amend his complaint because he has already done so once in state court and
21 once in federal court. Although the number of times a plaintiff has previously amended
22 his complaint is one factor the court considers in determining whether to permit
23 additional amendment, the most important factor is prejudice to the defendant. *See*
24 *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1051–52 (9th Cir. 2003) (district
25 court erred in denying leave to amend where only reason given was that plaintiff had
26 previously amended complaint three times). TLD has not articulated any prejudice it will

1 suffer from Plaintiff's further amendment of his complaint.

2 **3. Express or Implied Warranties**

3 Plaintiff alleges that TLD violated the WPLA because the cargo loader "did not
4 conform to express or implied warranties." (Dkt. No. 26 at ¶ 15.9.) Plaintiff's complaint
5 provides no factual information about any warranties or the manner in which they were
6 breached. Accordingly, Plaintiff's WPLA claim based on warranties is dismissed without
7 prejudice. Plaintiff may amend his complaint to add facts sufficient to support this claim
8 within twenty (20) days of the date of this order.

9 **III. CONCLUSION**

10 For the foregoing reasons, Defendant TLD's motion to dismiss Plaintiff's complaint
11 (Dkt. No. 41) is GRANTED IN PART and DENIED IN PART.

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13 DATED this 12th day of April 2013.

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20 John C. Coughenour
21 UNITED STATES DISTRICT JUDGE
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